Section 173 deals with the whole procedure of summary trials. Sub-sections (f) and (m) provide for the cases where the Magistrate may acquit the accused. (g) and (n) provide for the discharge for the accused.

I have been unable to find any circumstances which permit a Magistrate to "dismiss" a charge. The deplorable index of the laws does not refer to either "discharge" or "dismissal". I think it is clear that the earliest stage at which a Magistrate can acquit an accused person is after hearing all the evidence for the prosecution.

Therefore the Magistrate could not have acquitted in the present case, nor could he have awarded a discharge which amounted to an acquittal.

The appeal therefore fails.

Appeal Dismissed.

LOK YIN vs. PAT THOO.

[Original Civil Juris. (Cussen, J.) August 6, 1941]

Damages — Loss of expectation of life — Claim by plaintiff — Executors (Powers) and Fatal Accidents Enactment (Cap. 19), section 4 (1) — Civil Law Enactment No. 3 of 1937, section 4.

The Court in the Federated Malay States in seeking to estimate the sum to be given in damages for the loss of expectation of life under section 4 of the Civil Law Enactment No. 3 of 1937 should not adopt the scale of award made in similar cases in England but should adopt the attitude of mind exemplified by the award of the House of Lords in **Benham v. Gambling**(1) and give expression to it in fixing the amount to represent the loss of prospective happiness to a person in this country.

Suit tried before Cussen, J.

The plaintiff claimed damages on behalf of himself and his wife, the father and mother of a young man named Lok Soo who was killed by the negligence of the defendant. Liability was admitted and the only question in dispute was the amount of damages to be awarded.

B. J. P. Joaquim for plaintiff :—

Liability has been admitted and the only questions for decision are the amount of damages and their adjustment having regard to the circumstances.

As regards the method of calculation of damage under the Executors (Powers) and Fatal Accidents Enactment, see **Yam binti Baba v. Loy Chim**(2) and **Yee Kong v. Teh Seng**(3).

As regards the measure of damages for loss of expectation of life, the decision of the House of Lords in **Benham v. Gambling** (1) has completely revised the earlier view.

The earlier cases show that damages in the neighbourhood of £1,000 would be appropriate, but the House of Lords in **Benham v. Gambling**(1) laid down the general principle that damages should be moderate, and assessed them at £200 in respect of a child aged 2½ years.

The House of Lords also laid down that damages for an infant would normally be less than the damages for an adult who had established himself in life. On this basis, the damages in this case should be something in excess of £200. Money in Malaya is of no greater value than it is in England: in following the basis laid down by the House of Lords English pounds should be converted into their equivalent in dollars.

As regards the adjustment of the two sets of damages, it is clear that a dependant should not be paid twice over. His damages for loss of support caused by the death of the person supporting him must be mitigated by what he receives as beneficiary of the estate of that person. **Ellis v. Raine**(12) and **Yelland v. Powell Duffryn Collieries**(13).

The damages for loss of expectation of life belong to the estate and do not go entirely to the beneficiaries; funeral and administration expenses must first be paid out of the estate. These, therefore, should be taken into consideration when dealing with the amount by which the damages under the Executors (Powers) and Fatal Accidents Enactment are mitigated by the benefit received from the deceased's estate, **Feay v. Barnwell**(5).

W. G. W. Hastings for defendant :—

Since the decision of the House of Lords in **Benham v. Gambling**(1), awards for damages in these cases have been much reduced.

It is submitted that it is not a sound principle in assessing these damages to follow exactly the amount given in English cases. The social structure is different out here.

Social considerations must be taken into account — see the judgment of Scott, L.J., in **Ellis v. Raine**(6) at page 183. This man would earn in a month what an English miner would earn in a week. Howes, J., in **Yee Kong v. Teh Seng**(3) awarded $1,000 to a woman of the same age as the deceased in this case and that was before the decision in **Benham v. Gambling**(1) was reported.

It is not competent for the Court to take into account administration expenses. It is clear they cannot be claimed as damages — see **Rose v. Ford**(4) in the speech of Lord Wright. The point was not argued before Singleton, J. These expenses are necessary before the plaintiff becomes entitled to sue because imposed by law. In this case administration was taken out for the sole purpose of bringing this suit but in many cases they are necessary apart from a claim of this kind.

Cases referred to :—

(1) *Benham v. Gambling,* (1941) A.C. 157.
(2) *Yam binti Baba v. Loy Chim,* (1938) F.M.S.L.R. 322; (1939) M.L.J. 242.
(3) *Yee Kong v. Teh Seng,* (1940) F.M.S.L.R. 256; (1941) M.L.J. 58.
(4) *Rose v. Ford* (1937) A.C. 826.
(5) *Feay v. Barnwell,* (1938) 1 A.E.R. 31.
(6) *Ellis v. Raine* (1939) 2 K.B. 180.
(7) *Yelland v. Powell Duffryn Collieries* (1941) 1 A.E.R. 278.

Cussen, J. : — A young man named Lok Soo was run down on 12th October, 1940, by a motor lorry owned by the defendant, and died shortly after the accident.

The plaintiff is the father of Lok Soo and has taken out letters of administration to his estate.

The plaintiff now sues the defendant for damages resulting from the death of Lok Soo.

Liability is admitted and the only matter for the Court to determine is the amount to be given as damages. Claims are made under two distinct heads:

(1) A claim is made under section 4 (1) of the "Executors (Powers) and Fatal Accidents Enactment"

in respect of the loss resulting to the parents of the deceased; and

(2) A claim under section 4 of the Civil Law Enactment, 1937, for damages for the loss of expectation of life; a cause of action surviving for the benefit of the estate of the deceased.

The relevant facts are as follows:

The deceased was born on 25th May, 1921; he was unmarried and lived at the 4½ mile, Salak South, Kuala Lumpur, with his parents.

He was a tin-ore washer on a tin-mine and had worked as such for about five years.

His father was also a tin-ore washer.

Deceased was normally situated for his station in life, healthy, industrious, and of a peaceful and contented disposition.

Daily-paid, he earned on an average $36 per month.

The evidence given by the father (the plaintiff) shows that of that sum about $18 was spent on deceased himself for food, clothing and sundry expenses, and the balance of $18 went to his parents.

There was some talk about the deceased getting married, and the father tells us that "he would in the ordinary way have got married in a year or so".

Evidence was given as to the expectation of life of the father (aged 62) and mother (aged 60), and I find on the basis of the joint expectation the period to be taken for the purpose of calculating the loss to be eleven years.

Of that period I take the deceased as a bachelor for two years, and after that for nine years as a married man. After marriage it is clear that the deceased would not be able to make anything like the same contribution as before to his parents; he would have a wife to maintain and in the ordinary course children must be expected.

I therefore estimate that after marriage the deceased would, on the average, have contributed about $10 per month.

The calculation then is :—

Two years at $18 per month	..	$ 432
Nine years at $10 per month	..	1,080
Total	..	$1,512

I make what I think is a minimum deduction over the period for unemployment, illness, etc., of ten per cent.

[In the case of *Yee Kong v. Teh Seng*[3], Howes, J., in the case of a woman mining coolie, made a deduction of 25 per cent.].

The result is $1,361 which I find as the amount of damages to the parents under the provisions of the Executors (Powers) and Fatal Accidents Enactment.

I turn now to deal with the second head of claim — the claim for what has been termed "loss of expectation of life".

The amount to be given as damages under this head is a matter of great difficulty — it cannot be arrived at by any method of calculation on real data such as I have employed when assessing damages under the first claim. Our law is identical with the corresponding English Act — the Law Reform (Miscellaneous Provisions) Act, 1934. Section 4 of the Civil Law Enactment, 1937, is the same as section 1 of the English Act.

It is therefore proper for me to seek for assistance and guidance in the decisions of the English Courts on this question.

How difficult it has proved to be is well-known from the decisions and judgments in the cases reported from the English Courts for the past six years, culminating in the judgment of the House of Lords in *Benham v. Gambling*[1] given on December 16th 1940.

That judgment is of course the one which I must follow, but it will be useful to refer briefly to what appears to have been the general result (so far as such term may be truly applied) of the cases prior to *Benham v. Gambling*[1].

The assessment of the amount of damages was made in some cases by a jury and in others by a Judge and are entirely arbitrary, empirical and not capable of being reduced to any principle.

But for an adult — in normal cases — awards of £1,000 to £1,200 seemed to show a tendency for that amount to become a standard.

In the case of young children nothing very regular emerges from the cases, but amounts as high as £1,000 and £1,200 and £1,500 (for a boy of eight years) have been awarded. But there appeared to be some consensus of opinion that owing to the uncertainties of childhood — illness, need for dependence on others for care — the amount should be less than for an adult who had passed such stage of life and was educated, and presumably independent and equipped for life.

However, we now have the judgment of the House of Lords in *Benham v. Gambling*[1]. In that case a boy of 2½ years old was killed in an accident. An award of £1,200 for loss of expectation of life was upheld in the Court of Appeal. On appeal to the House of Lords it was held that the proper assessment of damages in this case, where the prospects of the boy were particularly favourable, was £200.

The assessment of such damages is not to be made upon an actuarial basis. And it was laid down that in these cases what is assessed is not compensation for loss of years or for the loss of future pecuniary prospects but it is the fixing upon common sense principles of a reasonable figure for the loss of prospective happiness.

I may quote the following passages from the judgment given by Lord Chancellor Simon :—

> The thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life.
>
> In assessing damages for shortening of life, therefore, such damages should not be calculated solely, or even mainly, on the basis of the length of life which is lost. It is damages for the loss of a measure of prospective happiness.
>
> Before damages are awarded in respect of the shortened life of a given individual under this head it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness.
>
> The main reason, I think, why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects, having passed the risks and uncertainties of childhood, and having in some degree attained to an established character and to firmer hopes, his or her future becomes more definite, and the extent to which good fortune may probably attend him at any rate becomes less incalculable. I would add that, in the case of a child, as in the case of an adult, I see no reason why the proper sum to be awarded should be greater because the social position or prospects of worldly possession are greater in one case than in another. Lawyers and Judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status.

One may fittingly recall the words of the Poet, Thomas Dekker :—

> Art thou poor yet has thou golden slumbers?
> O sweet content!
> Art thou rich, yet is thy mind perplexed?
> O punishment!

We are told that in putting a money value on the prospective balance of happiness the jury or judge of fact is attempting to equate incommensurables; and that in assessing damages under this head a very moderate figure should be chosen.

It was agreed by all that the proper figure in the case was £200 and that even that would be excessive were it not that "the circumstances of the infant were most favourable".

Finally, the judgment states that "we are in substance correcting the methods of estimating this head of loss whether in the case of children or adults which have grown up in a series of earlier cases".

How am I to use this decision in fixing an amount to be awarded in the present circumstances?

The submission by counsel for the plaintiff is that I should simply convert the sum of £200 into dollars and take that as the award to be given for a boy of 2½ years in this country, whose circumstances were "most favourable".

It will be helpful if I quote from the judgment the circumstances which are described as "most favourable".

> The child was a normal healthy child, living in a country village off the main road, where the risk of being exposed to road dangers and to certain diseases would be less than in a crowded centre. His father was in steady employment and had reasonable prospects of continuing in it. The judge summed up his view of these facts by saying that the child was 'living in modest but otherwise favourable circumstances in a village, the father having been in continuous employment for 15 years'.

The question is difficult but I do not think that a scale of awards to be made in different cases in this country should be built up just by adopting whatever scale of awards will result in England from that award made by the House of Lords: by taking the sums in pounds sterling and converting them into dollars.

Rather, sitting in this Court in Malaya, I seek to induce in myself an attitude of mind, an outlook, similar to that which is reflected in the House of Lords award in England and then ask myself how I would give expression to that here in taking a sum of money to represent the value to be given to the loss of prospective happiness in the case of a boy 2½ years, most favourably situated in his station of life, whether it be high or low. It is not I think a mere matter of the exchange value between pounds sterling and dollars.

For such a case I would take a round figure of $1,000.

I am told by counsel that in England since *Benham v. Gambling*[1] the award in the case of an adult in normal circumstances seems to be about £350.

In the present case before me here, that of a young man of 20 years of age, who in his station of life seems to me to have been as well situated and likely to have as happy a life as anybody else of the same age, whatever their place in life, I take a figure of $1,750.

Under his claim on behalf of the estate of the deceased, the plaintiff also seeks to recover a sum of $159.75 being funeral expenses $20, estate duty $50, legal expenses for obtaining letters of administration $80, and Court fees in connection therewith $9.75. Counsel for plaintiff, as I understood him, relied upon the decision of Singleton, J., in *Feay v. Barnwell*[6] as authority that such expenses were recoverable as damages. But I do not so read that decision. Singleton, J., did not include duty and administration proceedings expenses in his award of damages under the Civil Law (Miscellaneous Reforms) Act. But he ascertained from counsel the amount of such in order

to arrive at the nett amount which the dependent would receive from the award to the estate.

The funeral expenses are of course expressly recoverable under either head of claim by virtue of the provisions of section 4 (ii) (c) and section 5 (ii) of the Civil Law Enactment, 1937.

In my opinion the other expenses are not recoverable.

To the $1,750 I have taken must be added the amount of $20 as funeral expenses, making $1,770.

It remains to consider what effect the award to the estate has upon the claim as a dependent. Examination of the cases from *Rose v. Ford*[4], through *Feay v. Barnwell*[5] and others, and *Ellis v. Raine*[6], to *Yelland v. Powell Duffryn Collieries*[7] reveals clearly that the principle to be applied is that when a dependant receives any benefit — any pecuniary benefit — from the estate of the deceased, to that extent his loss as a dependant is satisfied. But the Court must give a definite judgment.

It is necessary, therefore, for the Court to ascertain the amount of such benefit, if any. That could of course be determined with certainty and accuracy only in the administration of the estate.

However, in those cases where it arises it must be done here and now.

That it may, in particular cases, present great difficulty, is evident.

All prior claims, including those of creditors and/or legatees must be satisfied before the dependant receives anything.

It may well happen that such priorities would absorb much or all of the estate leaving little or nothing for a dependent-beneficiary. How it is to be done is, it seems to me, a problem to be solved, as best it may, in each particular case.

The method — if I read it aright — stated in the judgment of L. J. Goddard in *Ellis v. Raine*[6] would not, it seems to me, solve every case. When there were creditors and other prior claims it might result in the dependant receiving nothing whatever. The concluding paragraph of the judgment of Du Parcq L. J. in *Yelland v. Powell Duffryn Collieries*[7] shows what the difficulties may be. He says :—

> Counsel for the respondents supported his argument by indicating some of the difficulties which must confront the Court if his contention did not prevail. These difficulties, which I think seldom arise in practice, are not a novel product of this recent legislation. There were always some causes of action which did not die with the aggrieved person and since 1846 (the date of the Fatal Accidents Acts) there has existed the danger that a jury might be faced with the difficult duty of assessing the damages proportioned to a dependant's loss with due regard to the probable result of a pending or possible future action from which the dependants might benefit. If the juries of the nineteenth century were equal to the task I know no reason why their modern successors, or Judges performing the same functions should be less successful.

Fortunately this case, as placed before me, presents no great difficulty — there are no creditors and the deceased was intestate. So there are only such prior charges on the estate as funeral expenses, administration expenses, estate duty and the like.

As such the above-mentioned sum of $159.75 is to be deducted from the amount awarded to the estate to find what comes to the dependants as beneficiaries. It leaves $1,610.

As this is greater than the estimated loss to the dependants that loss is completely covered.

The plaintiff will then have judgment for $1,770 and costs.

Judgment for Plaintiff.

KAPOOR SINGH vs. HAJI IBRAHIM BIN HAJI MOHAMED NOOR.

[Original Civil Juris. (Murray-Aynsley, C.J.)
August 25, 1941]

Attachment in execution — Appointment of receiver under section 275A of the Civil Procedure Code (Cap. 7) — Malay Reservations Enactment (Cap. 142), section 13.

The Plaintiff obtained judgment against the defendant and applied under section 275A of the Civil Procedure Code (Cap. 7), for an order that a receiver be appointed in respect of a piece of land owned by the defendant in a Malay Reservation area.

Held, that the appointment of a receiver under section 275A is an attachment in execution within the meaning of section 13 of the Malay Reservations Enactment (Cap. 142), and is therefore prohibited.

J. A. Thivy for plaintiff :—

This is an application for the appointment of a receiver by way of equitable execution under section 275A of the Civil Procedure Code which came into force on 2nd day of September, 1940.

The section provides that the Court may appoint a receiver by way of equitable execution in circumstances in which the High Court of Justice in England would make such an appointment.

Inter alia, the applicant has to shew that the defendant has no property which could be taken by ordinary process of execution, and if he has, to give reasons why legal execution would be useless.

In this case the defendant is the owner of some pieces of land within a Malay Reservation which cannot be attached in execution as provided under section 13 of the Malay Reservations Enactment. The lands cannot vest in the Official Assignee or a trustee as provided under sections 12 and 14 of the Malay Reservations Enactment.

Therefore the defendant's lands cannot be taken by ordinary process of execution.

I cite the following cases: Wills v. Luff[1]. Levasseur v. Mason & Barry[2]. Re Shephard[3]. Halmes v. Millage[4].

As section 275A came into force after the Malay Reservations Enactment it must have been the intention of the legislature to apply this section 275A to lands held under Malay Reservation.